

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

ORIGINAL

75-7259

To be argued by
JOSEPH M. WEITZMAN

In The
United States Court of Appeals
For The Second Circuit

FRANK LOWELL,

Plaintiff-Appellant,

vs.

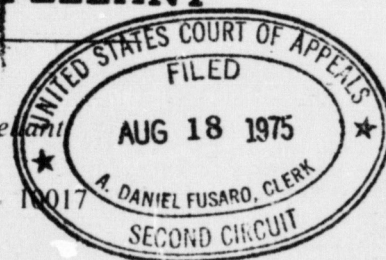
TWIN DISC, INCORPORATED,

Defendant-Appellee.

*Appeal from the Order of the Hon. Jacob Mishler Dated
March 28, 1975*

REPLY BRIEF FOR PLAINTIFF-APPELLANT

JOSEPH M. WEITZMAN
Attorney for Plaintiff-Appellant
521 Fifth Avenue
New York, New York - 10017
(212) MU 7-7505



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 75-7259

FRANK LOWELL,

Plaintiff-Appellant,

-against-

TWIN DISC, INC.,

Defendant-Appellee.

REPLY BRIEF FOR PLAINTIFF-APPELLANT

STATEMENT

This reply brief is submitted in response to the brief filed by Twin Disc, Inc. ("Twin Disc"), the defendant-appellant herein. Plaintiff has appealed from an Order entered on April 1, 1975 in the United States District Court for the Eastern District of New York denying his motion to amend the complaint and granting the defendant's motion for summary judgment. A copy of said Order is attached hereto as Exhibit "A" for the convenience of this Court.

POINT I

REPLYING TO POINT I OF
TWIN DISC'S BRIEF

- A. Twin Disc's argument that summary judgment was correctly granted lacks merit

The defendant's motion for summary judgment in the district court is based primarily upon the res judicata effect of a judgment in favor of a subsidiary of the defendant in another lawsuit tried in the Supreme Court of the State of New York. More importantly, the Memorandum of Decision and Order dated March 28, 1975 of the District Court by Chief Judge Jacob Mishler is grounded exclusively on the res judicata defense asserted by defendant Twin Disc. (290a et seq.).^{1/} It is this Decision and Order which is being appealed.

Plaintiff contends that threshold inferences and presumptions made by the district court were contrary to the facts before it and that the remainder of the Decision and Order which is based on the erroneous information is therefore adversely effected and in fact constitutes reversible error.

^{1/}
References to the Joint Appendix are cited as page numbers followed by the letter "a".

In the Second Circuit case of McNellis v. First Federal Savings and Loan Association of Rochester, N.Y., 364 F.2d 251 (2d Cir., 1966), the Court heard the appeal of trustees in bankruptcy whose complaint was dismissed below on principles of res judicata. The trustees had previously suffered an adverse judgment in state supreme court, whereupon First Federal then renewed a stayed motion for summary judgment in the district court. The district court granted summary judgment to the defendant and denied plaintiffs' motion to amend their complaint by adding a new cause of action not determined (although attempted to be pleaded) in the prior state court action. The district court grounded its decision on res judicata. As can be seen the McNellis case was in a remarkably similar posture to the case at bar.

On appeal the Court first explored the doctrine of res judicata at page 254-5:

"Briefly, where a judgment has been rendered in an action between two parties for a sum of money and there is subsequently another action between the same parties, the first judgment has varying conclusive effect. If the second action is based upon the same cause of action as the first, the prior judgment is conclusive as to all matters which were litigated or might have been litigated in the first

action. However, if the second action is based upon a different cause of action, the prior judgment is conclusive between the parties only as to matters actually litigated and determined by the first judgment; that judgment is not conclusive as to matters which might have been, but which were not, litigated and determined in the prior action. *Cromwell v. County of Sac*, 94 U.S. 351, 352-353, 24 L.Ed. 195 (1877); *Restatement, Judgments*, 158-59 (1942)"

The Court next commenced a factual examination of what was litigated in the state court action in much the same language as did Chief Judge Mishler:

"The obvious beginning for an inquiry into res judicata is a determination of what was claimed and decided in the first action." *McNellis, supra*. at 255.

It was observed that the trustees never had a chance to plead certain claims in the state court and therefore as to those claims "there was no evidence at all adduced in plaintiff's favor." The claims were certainly not subject to dismissal in the state court action since they were not formally pleaded. The Court concluded by holding:

"[A] reasonable doubt as to what was decided in the first action should preclude the drastic remedy of foreclosing a party from litigating an essential issue." *McNellis, supra*, at 257.

In addition, the burden of showing conclusively what was determined in the prior litigation falls upon defendant. (Principal Brief for Plaintiff-Appellant, pps. 18-19). The defendant attempts to meet that burden with mere self-serving but unsupported assertions. The granting of summary judgment in the McNellis case was reversed and a similar result should follow in the instant litigation.

In addition, plaintiff maintains that numerous issues of material fact are raised by the complaint and the proposed amended complaint, entitling plaintiff to a trial on the merits.

Although the decision appealed from does not discuss or in any way treat with the issues of fact raised by the pleadings but instead relies solely on the res judicata argument asserted by defendant, it should be emphasized that these issues of material fact do exist. One of the most basic controversies raised in this appeal is whether an employment agreement between plaintiff and LEM Instrument Corporation ("LEM") was separate and distinct from a stock acquisition agreement between plaintiff and Twin Disc. Also at issue is whether these contracts were separate and distinct from a guarantee of LEM's performance by Twin Disc to plaintiff, which guarantee contained sub-

stantial independent obligations of Twin Disc to and for the benefit of the plaintiff, wholly apart from the basic guarantee aspects of the agreement.

This issue is fundamental in view of the fact that plaintiff does not now seek to recover against the defendant based on the employment agreement. Rather, plaintiff's proposed amended complaint seeks recovery against Twin Disc based solely on Twin Disc's alleged breaches of the stock acquisition agreement and the contract of guarantee which breaches were pleaded as a third cause of action in the original complaint.

It is on this issue that evidence should be adduced and trial testimony taken. In support of Twin Disc's position that the employment agreement and the stock acquisition agreement were inextricably intertwined, it maintains at page 15 of its brief that the board of directors of Twin Disc sought to acquire the two principals of LEM - "nothing more". Twin Disc cites in support thereof the Certificate of Resolution of its board of directors dated March 21, 1968 (PA579).^{2/} However, in the same

^{2/}Reference to Plaintiff's Appendix in the state court action is cited as "PA" followed by the page number.

Certificate and in fact, in the same paragraph, the board of directors goes on to relate as follows:

"From our own experience in new products development, the purchase price paid to them appears to be somewhat less than it would cost were Twin Disc to start [development of a miniaturized clutch] from scratch. Further, that a good deal of time would be saved by taking over this development in its present stage."

It seems clear that that portion of this document supplied by defendant gives support to plaintiff's argument that Twin Disc was primarily interested in acquiring LEM's technological product line, especially LEM's miniaturized clutch assembly. It follows that Twin Disc may have welcomed an opportunity to acquire LEM's business and products without necessarily hiring LEM's employees. In fact this explanation is even more plausible than defendant's contention that it was acquiring two talented employees only. The fact that these inconsistent theories exist and are supported by the same document gives rise to a classic ambiguity of the type which must be resolved at trial. In addition, both parties submitted diametrically opposed affidavits on the question (See 262a;263a).

Another important and material issue of fact raised in the third cause of action in the complaint and in the fifth cause of action in the amended complaint relates to

whether the defendant breached its obligations, pursuant to paragraph 10 of the stock acquisition agreement (188a) to notify the plaintiff of any sale or dissolution of LEM and to give plaintiff a six months option to acquire LEM's outstanding shares from Twin Disc at terms equivalent to the proposed transfer. Plaintiff contends that defendant breached this obligation when it confronted plaintiff with a take-it-or-leave-it offer to buy the assets only of LEM at a price unilaterally set by defendant (199a).

As a further example of an unresolved factual issue, this Court need only examine the footnote at page 17 of defendant's brief herein. There, defendant hotly disputes plaintiff's allegation, found in the fourth cause of action (20a) of his proposed amended complaint, that the assets of LEM have been sold. If plaintiff is correct, he will have suffered great pecuniary damage. This is precisely the type of material issue which was not brought up in the state court action, which was not treated or discussed in the Opinion and Order appealed from, and which was somehow swept under the rug by the application of the res judicata doctrine. A discussion in detail of these and other issues of material fact is contained in Point II of plaintiff's brief previously served and filed herein.

The ad hominem digressions and "crocodile tears" shed by a large international corporation in a dispute with a single individual of limited means should not be permitted to obscure the fact that meritorious claims exist here which have not yet been explored on the merits.

POINT II

REPLYING TO POINT II OF
TWIN DISC'S BRIEF °

- A. Numerous triable issues of material fact exist in this action.

Notwithstanding the evidence of genuine unresolved factual issues before the district court which were raised by each and every cause of action contained in the proposed amended complaint, the district court chose to avoid these issues and to rely exclusively on the theory that the entire controversy had been tried once before in the state supreme court and that the adverse result barred the plaintiff from restating its claims in any other forum. The court began its discussion of the res judicata theory by attempting to discern just what was properly before the state supreme court. Chief Judge Mishler realized that the first and second causes of action contained in plaintiff's

original district court complaints were no longer available to him. The plaintiff conceded as much. The court then embarked upon a series of presumptions and inferences against plaintiff's position which effectively short-circuited the very matter that was before it for determination.

Without any proof on the subject and, in fact, in the face of considerable evidence to the contrary, the court decided that the stock acquisition agreement, like the employment contract was "implicitly conditioned on plaintiff's continued status as an employee in good standing." Further, the Court observed in a footnote that although certain provisions of the stock acquisition agreement were not stated by the parties to be conditioned upon plaintiff's continued employment, "such terms must be presumed". In one sweeping stroke the court foreclosed by presumption and implication the very matters that were presented to it for decision. This result is all the more alarming because it was accomplished on a motion for summary judgment wherein it is universally recognized that doubts and close questions must be resolved against the movant. A decision built on a foundation as flimsy as appears in this case should not be permitted to stand.

- B. The proposed amended complaint alleged valid causes of action not previously adjudicated; and the denial of plaintiff's motion to amend the complaint was an abuse of discretion.

Despite the generally held notion, incorporated into the provisions of FRCP Rule 15(a), that leave to amend a pleading should be "freely given when justice so requires", the plaintiff's motion for leave to amend the complaint was denied. It appears that the denial of leave to amend was based on the erroneous premise that the proposed causes of action had already been aired in the state court action. As has previously been shown in plaintiff's primary brief, the proposed causes of action were not, nor could they have been in any way disposed of in the state court action. In fact, the state court action was against LEM, the subsidiary alone. Twin Disc, the parent and the defendant herein was not, nor could it have been, a defendant in the state court action due to the fact that an action by plaintiff against Twin Disc was then currently pending in the Eastern District of New York.

In point of fact the proposed amended complaint contains six causes of action arising out of provisions of the stock acquisition agreement and the guarantee of performance contract, which contracts were separate and distinct

from the employment contract. Issues relating to Twin Disc's breach of the terms of the latter contracts were specifically excluded from the state court action. Thus, the first cause of action of the proposed amended complaint alleges Twin Disc's breach of the stock acquisition agreement in that Twin Disc violated its obligations to elect plaintiff to the board of directors of its wholly owned subsidiary, LEM. The second cause of action arises out of Twin Disc's violation of its guarantee agreement. The third cause of action arises out of Twin Disc's violation of the stock acquisition agreement in that Twin Disc prematurely terminated the business of LEM on the eve of profitability of that subsidiary so as to avoid defendant's obligations to pay plaintiff additional shares of Twin Disc stock based on the net profits of the subsidiary. The fourth cause of action is based on the guarantee agreement wherein Twin Disc directly obligated itself to plaintiff, apart from the activities of LEM, to provide plaintiff with equivalent employment in this locale in the event that the business of LEM was terminated or sold. The fifth cause of action alleges that Twin Disc violated the provisions of the stock acquisition agreement in that it failed to offer to plaintiff a six months option to acquire from Twin Disc all of the outstanding shares of LEM. This point is more fully discussed, supra. Finally the sixth cause of action alleges that Twin Disc violated paragraph 17

of the stock acquisition agreement in that Twin Disc failed to use its best efforts to keep LEM's business organization intact and to preserve for LEM the good will of its suppliers, customers and other business relations; instead, defendant discharged all of the officers and employees of LEM on October 11, 1972 and thereby terminated the business of LEM.

It is clear therefore that each of the proposed causes of action is based, not on the employment agreement, but on one of several other documents executed on July 3, 1968. The denial of plaintiff's motion to amend the complaint under these circumstances constitutes an abuse of the discretion of the District Court.

CONCLUSION

It is respectfully submitted that the Order appealed from should be reversed, Twin Disc's motion for summary judgment should be denied and plaintiff's motion to amend his complaint should be granted.

Dated: New York, New York
August 14, 1975

Respectfully submitted

JOSEPH M. WEITZMAN
Attorney for Plaintiff-
Appellant

MEMORANDUM OF DECISION AND ORDER (Filed March 31, 1975)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- -x

FRANK LOWELL,

No. 72-C-1582

Plaintiff,

- against -

Memorandum of Decision
and Order

TWIN DISC, INCORPORATED,

Defendant.

----- -x

March 28, 1975

Plaintiff moves for leave to amend his complaint pursuant to Rule 15(a) of the Federal Rules of Civil Procedure. Defendant opposes plaintiff's motion to amend, and moves for an order granting summary judgment against plaintiff on the ground that his claim is barred by res judicata.

On July 3, 1968, plaintiff entered into two written agreements (an employment agreement and a stock acquisition agreement) with Lem Instruments Corporation ("Lem") and guaranteed by defendant. Pursuant to the terms of these agreements, plaintiff and his partner sold their stock (consisting of all the outstanding shares) in Lem to defendant. In return, plaintiff received 3,680 shares of Twin Disc stock and was hired as president and general manager of Lem for a period of seven years. The employment agreement, was specifically

conditioned upon plaintiff's faithful and diligent performance of his duties. The stock acquisition agreement was likewise implicitly conditioned upon plaintiff's continued ^{/1} status as an employee in good standing.

From the time the contracts were executed in July of 1968 until the company's dissolution in October 1972, Lem operated at a loss. In the four years of its existence Lem lost over \$250,000. During this same period Twin Disc advanced Lem over \$450,000 in an effort to bolster its business. On October 9, 1972, however, the board of directors of Lem voted to cease operations and to discharge Mr. Lowell for failure to perform his duties under the agreement. On this same date, pursuant to a clause in the acquisition agreement, Twin Disc sent a letter to Mr. Lowell offering to sell him the outstanding shares of Lem. Plaintiff did not respond to this offer.

/1 Although the agreement does not contain a clause conditioning payment upon plaintiff's continued employment consistent with the terms of the contract and Lem's continued existence, since both contracts were executed simultaneously and for the same purpose -- to finalize the sale of Lem -- such terms must be presumed.

Shortly after Lem's dissolution and his dismissal, plaintiff commenced the present suit against Twin Disc in Suffolk County Supreme Court. The action was subsequently removed to this court pursuant to 28 U.S.C. §1441. During the pendency of this proceeding, plaintiff commenced a separate action against Lem in Suffolk County Supreme Court. In this latter action plaintiff sued for damages and lost wages, claiming that defendant Lem breached its employment agreement by wrongfully discharging him. Defendant maintained that plaintiff's discharge was for cause, based on his failure to perform his duties in accordance with the terms of his employment agreement.

This action, Lowell v. Lem Instruments Corp., 73-1733 (Supreme Court Suffolk County), was tried before Judge Scileppi and a jury in Suffolk County Supreme Court in October 1973. The jury returned a unanimous verdict in favor of defendant on October 12, 1973. This judgment was unanimously affirmed by the Appellate Division (44 A.D.2d 909 (2d Dept. 1974)) and the Court of Appeals denied permission to appeal, 34 N.Y.2d 520 (1974).

Defendant's opposition to the motion to amend and the motion for summary judgment is based on the res judicata

effect of the judgment against plaintiff in the state court. As an initial matter, it is clear that defendant Twin Disc may properly assert the defense of res judicata even though it was not a party to the prior action. Since Twin Disc owned and controlled Lem at the time of the events in issue in both actions, there is a sufficient relationship of privity between the two parties to permit this defendant to assert the res judicata defense. E.g., Nickert v. Puget Sound Tug & Barge Co., 335 F.Supp. 1158 (W.D.Wash. 1971); B.R. DeWitt, Inc. v. Hall, 19 N.Y.2d 141 (1967).

The issue remaining for determination is whether the prior judgment bars litigation of the claims and proposed claims asserted in this action. To resolve this issue it is necessary to determine what matters were decided by the earlier judgment. From the pleadings, the evidence and the judge's charge, it is apparent that the primary questions before the jury were whether the dissolution of Lem and the discharge of plaintiff were justified. In this regard defendant produced substantial evidence supporting its contention that Lem was dissolved because of its substantial losses and that plaintiff was discharged for cause.^{/2} Therefore, the verdict in favor of

^{/2} There was considerable testimony at trial that plaintiff fired Lem's most valuable employees, that he disregarded and mismanaged Lem's business and that he was abusive to his employees.

defendant can only be interpreted to mean that the trier of fact was convinced that the defendant did not breach the employment agreement with plaintiff, and that his discharge as well as the dissolution of Lem were justified.

The doctrine of res judicata bars relitigation of those issues actually litigated in a prior proceeding as well as those issues which could have been litigated in that proceeding. E.g., Williamson v. Columbia Gas & Electric, 186 F.2d 464, 469 (3d Cir. 1950); Keys v. Sawyer, 353 F.Supp. 936, 940 (S.D.Tex. 1973). The claims raised in plaintiff's original complaint, as well as those raised in the proposed amended complaint all relate directly to the issue of plaintiff's discharge and its effect upon the 1968 agreement. It is evident that all the claims now asserted by plaintiff in the present action could have been litigated in the state court proceeding and are therefore barred.

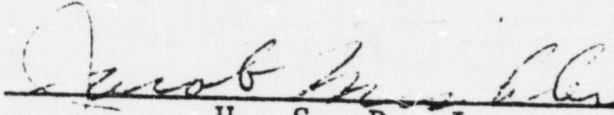
The first two causes of action in the original complaint are identical to the claims raised in the Lem action, and, as plaintiff readily concedes, are obviously barred here. The third cause of action in the original complaint, as well as the six causes set forth in the proposed amended complaint each seek damages under the 1968 employment and stock acqui-

sition agreements. In each instance the cause is based, either explicitly or implicitly, on the claim that defendant breached the agreement by wrongfully discharging plaintiff. Since this underlying issue has already been litigated and determined against plaintiff, the court will not reconsider the state court judgment or the subsidiary issues raised here. Although plaintiff has attempted to frame his proposed complaint so that it appears to raise new issues, it is clear that all the claims ultimately depend upon plaintiff's rights under the 1968 agreements. Since it has been determined that plaintiff breached this employment agreement and thereby forfeited his rights to enforcement of this agreement the claims set forth in his complaint are barred. Moreover, while rule 15(a) states that leave to amend should be freely given, where such an amendment would be futile because the claim itself would be subject to dismissal, the motion to amend should be denied. DeLoach v. Woodley, 405 F.2d 496 (5th Cir. 1969). Consequently, plaintiff's motion for leave to amend is denied, and defendant's motion for summary judgment is granted and it is

SO ORDERED.

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The Clerk of the Court is directed to enter judgment in favor of defendant and against plaintiff dismissing the complaint.


U. S. D. J.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

FRANK LOWELL,

Plaintiff-Appellant,

- against -

TWINDISC, INC.,

Defendant-Appellee,

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF New York

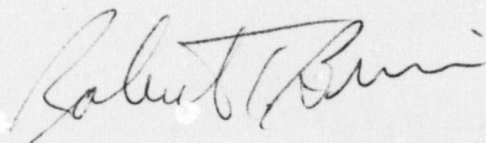
ss.:

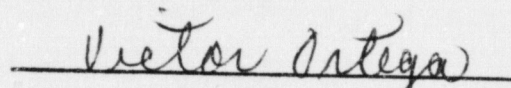
I, Victor Ortega, *being duly sworn,*
depose and say that deponent is not a party to the action, is over 18 years of age and resides at
1027 Avenue St. John, Bronx, New York
That on the 18th day of August 19 75 at 1 Chase Manhattan Plaza, N.Y., N.Y.

deponent served the annexed Appellants Brief(Reply) upon

the Attorney in this action by delivering ² a true copy thereof to said individual
personally. Deponent knew the person so served to be the person mentioned and described in said
papers as the Attorney(s) herein,

Sworn to before me, this 18th
day of August 19 75




VICTOR ORTEGA

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977